

STATE OF VERMONT  
BENNINGTON COUNTY, SS

<p>State of Vermont</p> <p>v.</p> <p>Kirk Beckwith Defendant</p>	<p>DISTRICT COURT Docket No. 68-8-09 Bncs</p>
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FILED  
DISTRICT COURT OF VT.  
OCT 16 2009  
UNIT TWO  
BENNINGTON CIRCUIT

OPINION & ORDER

This matter was set for a civil suspension hearing within the statutory time limits following Defendant's arraignment on August 11, 2009 on a charge of DUI#3. At the hearing on August 26, 2009, the State was represented by Legal Intern Kate Burton, supervised by Christina Rainville, Esq. Defendant was represented by Bradley Myerson, Esq.

Findings of Fact

1. On July 21, 2009 at approximately 11:05 p.m. , Trooper Christopher Burnett was dispatched to 350 Spruce Lane in Dorset, Vt. to investigate the report of a "suspicious vehicle" in the driveway of that residence by a neighbor. The neighboring house was a seasonal residence, and the caller was concerned about a possible break-in. She described the vehicle as a two-tone pick-up, red over grey, with lights on top, from which she heard loud music.

2. While en route, the dispatcher informed Trooper Burnett that the truck had left the driveway. He also had developed information identifying Defendant as a "key holder" to the 350 Spruce Lane property, and further informed Trooper Burnett that Defendant operated a 2001 Dodge truck with colors matching the neighbor's description.

The dispatcher also told Trooper Burnett that Defendant was identified to another address, 973 Nims Road.

3. Trooper Burnett set off for 973 Nims Road, intending to attempt to locate Defendant in order to dispel any further concern aroused by the neighbor's sighting of a "suspicious vehicle" at 350 Spruce Lane.

4. Nims Road is steep and unpaved, providing access to approximately six residences in a remote location in Dorset, and it was previously unfamiliar to Trooper Burnett. The 28 acre property at 973 Nims Road is owned by Defendant's sister, Laura Beckwith. The residence at this property is located some considerable distance beyond where Nims Road becomes private. That juncture is marked by a stone parapet on which a "Private Road" sign is prominently placed. Although Ms. Beckwith testified that she often closes the entrance with a chain, it is undisputed that no chain was in place when Trooper Burnett drove up the road on July 21. However, the private nature of the property is further evidenced by yellow signs along the road, posting the property against trespassers and hunting.

5. When he arrived at the residence at the end of the road, Trooper Burnett discovered a truck matching the caller's description, with loud music audible through the closed windows. The officer was able to observe Defendant apparently passed out in the driver's seat with the keys in the ignition. After two attempts at gaining Defendant's attention by knocking on the window, Trooper Burnett roused him.

6. When Defendant rolled down the window, Trooper Burnett immediately detected the odor of intoxicants. Defendant was at first unsure as to his whereabouts. He denied being a keyholder at 350 Spruce Lane, then admitted that he was. He denied

driving at first, then advised that he hadn't been driving for awhile. He denied drinking since arriving at the residence. When Defendant exited the truck, he was unsteady. He was unable to perform the walk and turn field sobriety exercise. After a preliminary breath test indicated a .156% BAC, Trooper Burnett arrested Defendant and transported him to the Shaftsbury State Police barracks for further processing on suspicion of driving while under the influence.

7. While administering the standard processing questionnaire for investigation of DUI, Trooper Burnett arranged for Defendant to speak with an attorney, at the point in the DUI processing calling for Miranda warnings prior to further inquiry as to potentially incriminating statements. As a result, Defendant declined to answer further questions contained in Sec. 7 of the DUI Processing Form headed "Interview". In the next section, Sec. 8 headed "Implied Consent", Trooper Burnett checked the box indicating that he read Defendant: "You have a right to talk with a lawyer before deciding whether or not to submit to an evidentiary test. If you want a lawyer, a Public Defender will be contacted at the state's expense, regardless of your income, or an attempt will be made to contact an attorney of your choice at your expense". However, during his testimony, Trooper Burnett acknowledged that he omitted reading this part of the form to Defendant, since Defendant had already consulted with the on-call public defender in connection with the Miranda warning.

8. Without having been informed of his separate right to consult with counsel prior to submitting to an evidentiary breath test, Defendant agreed to submit to the test. The datamaster result was .116 % BAC at 1:57 a.m. on July 22.

9. Based on the testimony of the State's expert chemist, Defendant's BAC was above .08 at the time he was found in his truck just before midnight on July 21, and would still have been above .08 at the time Trooper Burnett was dispatched to the Spruce Lane location approximately one hour earlier.

### **Discussion**

Defendant challenges the State's right to suspend his operator's license, claiming that the officer had no basis to suspect he was operating a motor vehicle on a public highway, and that the officer improperly failed to inform him of his right to counsel before asking him to submit to the evidentiary breath test. Although concluding that the evidence supports the officer's reasonable suspicion that Defendant was operating a motor vehicle on a public highway while under the influence of intoxicating liquor, the Court agrees that the test results cannot support civil suspension having been obtained in violation of the right to counsel.

#### **A. Violation of Right to Counsel Under 23 V.S.A. § 1202(c)&(d)(4)**

Before being exposed to the penalties for failing to submit to an evidentiary test, one suspected of driving while under the influence has the right to consult with an attorney. 23 V.S.A. § 1202(c). At the time a test is requested, Sec. 1202(d)(4) mandates the law enforcement officer to provide certain statutory information, including "the right to consult with an attorney before deciding whether or not to submit to such test or tests." In this case, Trooper Burnett admits that he never provided the above statutory advice to Defendant.

This issue was squarely raised by Defendant's pre-hearing memorandum, and explored extensively at hearing. The Court allowed time for further briefing after the

hearing, particularly as the State had only brief notice of Defendant's legal arguments. Nonetheless, the State's memorandum of law filed on Sept 4, 2009 omits any discussion of this issue, focusing entirely on the "public highway" challenge.

In his initial and supplemental memoranda, Defendant carefully and persuasively explicates the jurisprudence which has developed around the sufficiency of the Sec. 1202(d)(4) requirement. The Court concurs that the facts here are governed by the holdings in *State v. Duff*, 136 Vt. 537, 540 (1978) ("failure of law enforcement officers to advise the defendant of his right to counsel ... mandates a suppression of the results of the breath test"); *State v. Madonna*, 169 Vt. 98, 102(1999)(failure of officer to advise DWI arrestee of right to speak to an attorney at public expense regardless of income warranted judgment for the operator in civil suspension proceeding); *State v. Gilman*, 173 Vt. 110 (2001)(failure to locate an attorney despite officer's repeated attempts invalidated breath test) and *State v. Velez*, 175 Vt. 23 (2003)(public defender's refusal to speak with DUI suspect required suppression of breath test). In all of these cases, the breath test results were excluded when, for various reasons, the suspect was completely deprived of his right to consult with counsel.

As Defendant concedes, in *State v. Roy*, 174 Vt. 451 (2002) and other cases discussed in that opinion, the Supreme Court has upheld the use of breath tests in other circumstances in which the challenged irregularities to the statutory advice fell short of "a complete denial of counsel". *Velez* at 26. In the face of claims that the admonition regarding counsel was insufficient, because either incomplete or arguably misleading, the Court has denied suppression where defendants fail to show that the tainted advice actually interfered with a meaningful opportunity to obtain legal advice. See, e.g. *State v.*

*West*, 151 Vt. 140, 142 (1989); *State v. Hamm*, 157 Vt. 666,667 (1991); and *State v. Lynaugh*, 158 Vt. 72,74 (1992). Had the State troubled to analyze this issue, conceivably it might have argued that the facts here fall more logically into the above line of authorities, and that Defendant's prior opportunity to speak with counsel before deciding whether to submit to further questioning undercuts any claim of prejudice. Not surprisingly, Defendant anticipated this analysis, and convincingly rebuts it: "A review of these authorities reveals that prejudice need only be shown where there is an incomplete or defective advice of rights given to a DUI arrestee, as opposed to the instant case, where Mr. Beckwith was never told about his right to speak to an attorney or a public defender, before deciding whether to provide a breath sample." Defendant's Supplemental Memorandum, p. 5.

Trooper Burnett's omission is easily understood in terms of human error, as distinguished from malevolent obstruction of justice. Nonetheless, as he acknowledged during his testimony, once Defendant requested the opportunity to speak to an attorney, the officer might have avoided the "sticky wicket" created here by suspending any further questioning under the Sec. 7 "Interview" heading. Had he then proceeded directly to the Sec. 8 "Implied Consent" section, perhaps with an explanation that it included a second and different choice about which an admonition regarding the availability of legal advice was required, there would be no fatal ambiguity as to the sufficiency of the opportunity to consult with counsel. Yet, without ever actually speaking the phrase specified in Sec. 8 for advising of the right to counsel prior to submitting to an evidentiary test, Trooper Burnett checked the box affirming that he had given the advice, apparently on the assumption that the issue already must have been covered when the on-call public

defender was contacted in response to Defendant's invocation of his right to remain silent. The assumption was unwarranted by any facts in evidence, and it is not supported by the Court's reading of the applicable caselaw.

#### **B. Sufficiency of Evidence of Impaired Operation on a Public Highway**

To sustain its burden in this civil suspension proceeding, the State must show that the officer "had reasonable grounds to believe that the person was operating, attempting to operate or in actual physical control of a vehicle in violation of section 1201 of (Title 23)". 23 V.S.A. § 1205(h)(1)(A). Section 1201 proscribes being impaired by alcohol while operating, attempting to operate, or being in actual physical control "of any vehicle on a highway". 23 V.S.A. § 4(13) defines "highway" in broad terms to include any "place open temporarily or permanently to public or general circulation of vehicles."

Defendant maintains that the officer had no basis for believing that he was operating while impaired on a public highway, because he was apprehended while sitting in his vehicle at the end of a long private road. Although unnecessary to its earlier conclusion that the breath test must be suppressed for violation of the statutory entitlement to be advised regarding the availability of counsel, the Court will discuss Defendant's alternative grounds in order to assure a complete review in the event of an appeal.

As is clear from the holding in *State v. Paquette*, 131 Vt. 631 (1989), the designation as a "private road" of the extension of Nims Road into Ms. Beckwith's property does not exclude it from the statutory definition of a "highway", which "examined in its entirety...is extremely broad". *State v. Trucott*, 145 Vt. 274, 283, (1984). Although Defendant relies on *State v. McNeil*, 164 Vt. 129(1995), that case is

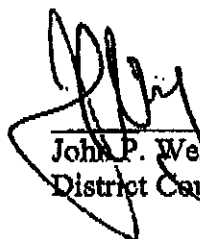
distinguishable not only because it involved a private parking lot rather than a private road, but also because the limitations to the general circulation of traffic were far more stringent. Furthermore, the opinion in *McNeil* is at pains to dispute the assertion of the dissent that it overruled *Paquette*.

Neither the sign indicating a "private road", nor other signs posting the property alongside the road, nor the testimony of Ms. Beckwith that she treasured her privacy and *sometimes* enforced it with a barrier across the bottom of the road, are sufficient to dispel the invitation presented by the unblocked road to the entry by Trooper Burnett. The Court notes that it is common in Vermont for private roads, including those marked as such, to be open both temporarily and permanently to the general circulation of vehicles. Trooper Burnett reasonably relied on that commonplace in proceeding up the road, and concluding that, having preceded him over the same course a little less than an hour earlier, Defendant had been operating a motor vehicle, or was in actual physical control, while under the influence on a public way.

### ORDER

For the reasons set forth above, JUDGMENT is GRANTED to Defendant, and the State's determination for civil suspension is DISMISSED.

Dated at Bennington this 15th day of October, 2009.

  
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John P. Wesley  
District Court Judge



Docket No.	68-8-09 Bncs	State vs. Beckwith, Kirk	68-8-09 Bncs
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Vermont District Court  
Unit 2, Bennington Circuit

Prosecutor:	Michael S. Munson	Defendant:	Kirk Beckwith
Motions pdg:		DOB:	06/23/1961
Incarcerated:	released	POB:	Winchendon, MA
Case Status:		Atty:	Bradley D. Myerson
Disposed		Aliases:	
Next Hearing:		Address:	P. O. Box 211 Manchester Center VT 05255

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Dspt Docket No. Allegation
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1 68-8-09 Bncs BAC at or above .08% bac
10/16/09 For Operator after te
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08/13/09 Civil suspension notice from DMV filed; request received by DMV on 07/27/09. Allegation: BAC at or above .08%. Paperwork was not filed on the date of the criminal arraignment. Brad Myerson appeared for Mr. Beckwith and did not waive the 42 day requirement. Case status changed to. Civil Suspension Final Hearing set for 08/26/09 at 04:00 PM. Appearance entered by Bradley D. Myerson on behalf of Defendant Kirk Beckwith.

08/14/09 1 document filed by Attorney Bradley D. Myerson for party 2: Notice of Contested Issues.

08/19/09 1 document filed by Attorney Bradley D. Myerson for party 2: Supplemental Notice of Contested Issues.

08/26/09 1 document filed by Attorney Bradley D. Myerson for party 2: Pre-hearing Memorandum. Video Tape ID: 8262009 Time: 04:02 PM. Civil Suspension Final Hearing held. JW/CDVIDEO. Entry Order: Will take civil suspension decision under advisement and gives the State additional time to response to the Pre- Hearing Memo by 9/4/09. Case status changed to Active - under advisement.

09/04/09 1 document filed by Attorney Michael S. Munson for party 1: State response to def. memo.

09/08/09 2 documents filed by Attorney Bradley D. Myerson for party 2: Kirk Beckwith's Supplemental Memorandum; Regarding Denial of his Right to Counsel.

10/16/09 Entry Order: Opinion and Order regarding Civil Suspension Merits Hearing. Findings mailed to parties 10/16/09. For the reasons set forth in the Opinion and Order, Judgment is granted to Defendant and the State's determination for civil suspension is dismissed. Judgment by Judge John P. Wesley; For Operator after testimony, effective on 10/28/09. Case closed. Faxed disposition to DMV CS.

## CIVIL SUSPENSION DISPOSITION REPORT

STATE OF VERMONT  
 DISTRICT COURT OF VERMONT  
 Unit No. 2, Bennington Circuit

DEFENDANT: Beckwith, Kirk  
 DOCKET NO. 68-8-09 Encls  
 ADDRESS: P. O. Box 211  
 Manchester Center, VT 05255  
 DOB: 06/23/61  
 POB: Winchendon, MA  
 LICENSE NO.: 80812744 STATE: VT

## ALLEGATION

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INCIDENT DATE: July 22, 2009  
 POLICE DEPT: VSP-Shaftsbury  
 INCIDENT #: 2009-09c301847

ALLEGED: The operator BAC at or above 0.08%.

OTHER FACTORS ALLEGED BY LAW ENFORCEMENT AGENCY:

## DISPOSITION

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Finding issued on: 10/15/09  
 For the reasons set forth in the Opinion  
 and Order, Judgment is granted to  
 Defendant and the State's determination  
 for civil suspension is dismissed.  
 Disposition: For Operator after testimony  
 Effective date: 10/28/09

DATE DISP. REPORT SENT

10/16/09

SIGNATURE, COURT CLERK

Mary C. Hunt